No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a partnership,

Petitioner,

vs.

DONALD T. REGAN, the Secretary of the Treasury of the United States of America, and THE UNITED STATES OF AMERICA,

Respondents,

and

BANK MARKAZI IRAN, THE ISLAMIC REPUBLIC OF IRAN and THE ATOMIC ENERGY ORGANIZATION OF IRAN,

Intervenors.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF INTERVENOR BANK MARKAZI IRAN

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I.

The President's Claims Settlement Powers, Including His Actions in Entering Into and Implementing the Algerian Declarations, Have Been Facilitated, Acquiesced in and Approved by Congress and the Courts.

A. Petitioner attempts to analyze this case as falling within the third category of the framework for analyzing separation of powers questions relating to foreign affairs set forth by Mr. Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube* v. *Sawyer*, 343 U.S. 579, at

635-638 (1952). Petitioner places exclusive emphasis upon the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1601 *et seq.*, and upon selected quotations from the legislative history of that Act. We will not repeat here the argument set forth in our principal brief (Pr. Br. at 29-31) and in the Brief for the Federal Respondents (U.S. Br. at 59-60), demonstrating that the FSIA was intended to and did deal solely with questions of sovereign immunity, and was not meant in other ways to restrict the power and ability of the Executive branch to resolve an undisputed international crisis.[1]

We do emphasize that petitioner's attempt to categorize this case as falling into the third category of Mr. Justice Jackson's analytical framework requires petitioner to ignore the consistent practice of Congress acquiescing in, approving and facilitating the President's claims settle-

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[1] Petitioner's suggestion (Pet. Br. at 15, n. 16) that Congress provided that no "future" international agreements could "affect" the FSIA is predicated upon a gross distortion of the legislative history and an out-of-context reading of congressional reports. The language in the FSIA legislative history referring to "future international agreements" relates only to post-FSIA agreements regarding sovereign immunity, not agreements settling claims. Indeed, the House Report explained explicitly that the deletion of the "future agreements" language was made because:

> [m]ention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under Article VI of the Constitution, take precedence, whether or not the bill was made subject to future international agreements.

H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 10 (1976). *See also, Hearings Before the Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary on H.R. 3493*, 93d Cong., 1st Sess. 87 (1973) ("of course, we know that because of the constitutional authority, the rulings of the court on executive agreements, treaties, and so forth, that that can take preeminence over statute") (Rep. Moorehead).

ment powers. *See*, generally, Appendix B to our principal brief. This congressional practice has continued in significant ways during and after the period of Congress' consideration and enactment of the FSIA. In particular: (1) the Congress which enacted the FSIA also considered but did *not* enact proposals designed to limit the power of the Executive to enter into Executive agreements, including claims settlement agreements (*see* Pr. Br. at 31-32; U.S. Br. at 61); (2) the same Congress amended the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621, *et seq.*, as amended (1980), to permit the Foreign Claims Settlement Commission to determine claims by United States nationals against the German Democratic Republic (22 U.S.C. § 1644b), to enable the Executive to "be in a better position to negotiate an adequate settlement . . . of these claims" (S. Rep. No. 94-1188, 94th Cong. 2d Sess. 2 (1976)); (3) one year later, Congress recognized and acted to facilitate the President's claims settlement authority when it enacted the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.* While one purpose of the IEEPA was to restrict Executive emergency powers in ways not relevant here (*see* Pr. Br. at 9-10, n. 3), Congress explicitly stated that "nothing in this Act is intended . . . to impede the settlement of claims of United States citizens against foreign countries," S. Rep. No. 95-466, 95th Cong. 2d Sess. 6 (1977); (4) in 1980, Congress amended the International Claims Settlement Act of 1949 to provide for determination of claims against Vietnam, again looking forward to an eventual Executive "agreement settling those claims" (Pub. L. 96-606, Section 702(5), 94 Stat. 3534, 3535 (December 28, 1980)); (5) Congress has indicated its approval of the Executive claims settlement agreement with the People's Republic of China (*see* Pub. L. 96-446, 94 Stat. 891 (October 13, 1980)).

Finally, and perhaps most significantly, Congress, after due consideration of the Algerian Declarations, refused to exercise its statutory authority under the IEEPA, 50 U.S.C. at §§ 1703, 1706, to block implementation of those aspects of the Executive's actions undertaken pursuant to that Act, which include, at the least, the nullification of attachments and judgments and the orders requiring transfer of the Iranian assets. *See* discussion in Appendix B to our principal brief at B-23 to B-25. Congress' failure to express disapproval of the Executive's action, or to take the steps to prevent implementation of the Declarations which Congress itself had established as a means to prevent Executive overreaching under the Act, are of the greatest significance. In no sense can the President be said to have acted contrary to the will of Congress and thus, in the words of Justice Jackson, with his power at "its lowest ebb." *Youngstown*, 343 U.S. at 638. Rather, the Executive's actions have been consistent with a "systematic, unbroken, Executive practice long pursued to the knowledge of Congress, and never before questioned." *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring). Accordingly, the President acted with the express or implied authorization of Congress, and thus, in terms of Justice Jackson's framework, with his powers at their maximum.

B. Petitioner's misreading of the effect of the FSIA upon the President's claims settlement powers derives from a fundamental error concerning the nature and purpose of that power. Petitioner focuses exclusively on the use of the claims settlement power as a means of facilitating the recovery by United States nationals of claims against foreign states and their citizens. But from the earliest days of its use, the claims settlement power was

utilized for a more important and overriding purpose: to enable the Executive to normalize relations with foreign states by means other than war, thereby providing for the peace and economic well-being of the entire nation. It is this latter concern which echoes through the judicial decisions and congressional debates (*see*, Appendix B to our principal brief) upholding the Executive's claims settlement powers. *See United States* v. *Pink*, 315 U.S. 203, 229 (1942) and 315 U.S. at 240 (Frankfurter, J., concurring); *Ozanic* v. *United States*, 133 F.2d 228, 231 (2d Cir. 1951). *See Gray* v. *United States*, 21 Ct. Cl. 340 (1866); *Blagge* v. *Balch*, 162 U.S. 439 (1896).

When considered in this light, it is not surprising that in enacting the FSIA Congress made no mention of the claims settlement issue, either in the text of the Act or the legislative history. Nor is it surprising that, as discussed above, after enactment of the FSIA Congress continued to acknowledge, approve and facilitate the Executive's exercise of the claims settlement power. The FSIA quite simply was irrelevant to the question of claims settlement. It simply was not contemplated by Congress or by the Executive branch, which drafted and urged passage of the Act, that the FSIA would disenable the President from acting in an undisputed international emergency to settle claims in a manner consistent with a practice as old as the Republic itself.

C. Petitioner makes little mention of the judicial authority, including decisions of this Court, recognizing and upholding the claims settlement power. Petitioner's half-hearted attempt to distinguish such cases fails.

Petitioner argues that *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), is not relevant because the settlement of claims involved in that case was effected by

a treaty, not an executive agreement.[2] Petitioner ignores the fact that historically claims settlements have been made by either method without legal distinction, and that in the past century executive agreements have been the usual practice. *See* 5 Moore, *International Law Digest* 221-222 (1906); J.B. Moore, *Treaties and Executive Agreements,* 20 Pol. Science Q. 385 (1905); 14 Whiteman, *Digest of International Law* 247 (1977). More importantly, petitioner ignores this Court's discussion of the historic claims settlement practice in *United States* v. *Belmont,* 301 U.S. 324 (1937) and *United States* v. *Pink,* 315 U.S. 203 (1942), in which the Court held that such international compacts do not require participation of the Senate. *See Belmont,* 301 U.S. at 330-31.

Petitioner further argues that *Belmont* and *Pink* are "not on point" (Pet. Br. at 19) because they are "fundamentally Supremacy Clause cases, holding that the terms of an Executive agreement take precedence over a con-

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[2] In an effort to avoid the clear command of *Schooner Peggy,* petitioner attempts to elevate the differences in prize procedures, particularly *de novo* review on appeal, into a matter of constitutional significance (Pet. Br. at 19, n. 19). The differences in admiralty procedure, however, are irrelevant here and have no impact on the rule of law established in *Schooner Peggy.* What is constitutionally significant is that the federal courts had Article III jurisdiction over the prize proceeding pursuant to § 9 of the Judiciary Act of 1789, 1 Stat 76; *Glass* v. *The Sloop Betsy,* 3 U.S. (3 Wall.) 6, 16 (1794). Moreover, the Court's ruling was not the result of a *de novo* review of the facts on appeal, but of the application of an intervening international agreement which terminated a judgment in favor of private parties.

Petitioner also suggests that the claimants in *Schooner Peggy* had no right to object to the claims settlement because, as crew members, they were "government agents" (*Ibid.*). But Congress had given the individual seamen a cause of action and the right to a portion of the prize. 1 Stat 715 (1799). While the FSIA permits individuals to bring claims against foreign sovereigns under certain circumstances, the 1799 statute, unlike the FSIA, created a right in the prize; the FSIA creates no substantive rights.

flicting state law policy . . . or state court order . . ." (*Id.* at 19-20). Petitioner's distinction is no distinction at all. Petitioner's cause of action is founded upon the law of California, pursuant to the public policy of that state. Petitioner equally could have brought suit in the state courts, as well as in federal court. The FSIA, at the most, merely conferred *jurisdiction* on the federal courts over petitioner's claim. The Act does not and was "not intended to affect the substantive law of liability." H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess. (1976), *reprinted in* U.S. Code Cong. & Admin. News 6604, at 6610.

Thus, in entering into the Algerian Declarations, the President exercised paramount federal authority under his constitutional and statutory powers. Just as in *Belmont* and *Pink*, the President's actions take precedence over conflicting state laws and policy.

II.

The President's Actions in Compelling the Transfer of Iranian Assets and Nullifying Petitioner's Attachments Are Authorizied by the IEEPA.

Petitioner argues that the "transfer order here is for all practical purposes a vesting order," which is not authorized by the IEEPA (Pet. Br. at 29). However, as is clear from the statute itself, vesting, as defined by Congress, means to take title to the property of a foreign state.[3] Here, the Executive has neither legally, nor prac-

[3] As the legislative history of the IEEPA indicates, the reason that Congress, with the assent of the Executive, excluded the vesting provision from the emergency powers contained in Title II of the Act was not out of concern with the protection of American claimants. Rather, neither Congress nor the Executive felt that a foreign government's property ought to be confiscated absent war. However, if Americans were "dying overseas" in a war, Congress

tically, attempted to take title to Iranian property in the United States.

In urging that vesting turns on the permanent or temporary nature of the Executive's order, petitioner simply ignores or forgets that it is ownership in property that is vested. Here, it is the Iranian entities which own the

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felt that enemy property could be vested by the President. *Revision of Trading With The Enemy Act: Markup Before the House Committee on International Relations*, 95th Cong., 1st Sess. 18 (1977).

Similarly, in 1965 the State Department obtained repeal of the provisions of a statute (Pub. L. 88-666, § 511(b), 78 Stat. 1110 (October 16, 1964)), which had provided for the vesting and sale of assets owned by the Cuban Government which previously had been frozen pursuant to Section 5(b) of the Trading With The Enemy Act, 50 U.S.C. App. § 5(b). The State Department took the view which "persuaded" Congress that:

> . . . the vesting and sale of Cuban property could set an unfortunate example for countries less dedicated than the United States to the preservation of property rights. The Government of the United States, as a matter of policy, encourages the investment of American capital overseas and endeavors to protect such investments against nationalization, expropriations, intervention, and taking. To vest and sell Cuban assets could, therefore, be counterproductive. It would place the Government of the United States in the position of doing what Castro has done. It could cause other governments to question the sincerity of the U.S. Government in insisting upon respect for property rights. The result could be a reduction, in an immeasurable but real degree, of one of the protections enjoyed by American-owned property around the world. Should this protection be diminished, the task of economic development to which the United States is devoting a great part of its strength and resources could become more difficult because of an attendant decrease in such investment.

Claims Against The Government of Cuba, S. Rep. No. 89-795, 89 Cong., 1st Sess. (1965), *reprinted at* [1965] U.S. Code Cong. & Ad. News 3581, 3583-84. *See* Pub. L. 89-262, Section 5, 79 Stat. 1988 (October 16, 1965) repealing the vesting provision.

Again, it was not concern for the rights of American creditors which led the Executive to argue against vesting but concern over creating the precedent of confiscating property of a foreign government or foreign nationals in non-war time situations.

property in question, not petitioner, and only if *they* were being "permanently" deprived of ownership could there even be an argument over whether vesting had occurred.

Petitioner claims that the "President's transfer order here seeks to dispose of Iranian assets by permanently divesting American creditors of their statutory rights against the property" (Pet. Br. at 28). However, as the *Zittman-Orvis-Brownell* line of cases makes absolutely clear, petitioner has no "interest, right or title" in the attached property here which can be asserted against the United States. Any interest that petitioner acquired vis-à-vis Iran with respect to Iranian property must be subordinate to the paramount interest of the Executive in administering the assets control regulations. Therefore, when compelling the transfer of assets, the Executive has not deprived petitioner of any rights whatsoever, since any rights it had were subject to the Executive's authority to control the Iranian assets.

Petitioner's construction of the IEEPA would lead to the absurd conclusion that the President would not have the power to resolve national emergencies because of attachments achieved under state law, attachments which were only possible because of the blocking order itself. To suggest that the President does not have the power to return the assets to their status prior to the blocking order and thus to allow their transfer out of the country, is tantamount to perpetuating the national emergency by virtue of the exercise of the very powers which were designed to allow the President to deal with the emergency. Certainly, Congress could not have intended such a result.

CONCLUSION

For the reasons stated above, and in our principal brief, the judgment of the district court should be affirmed.

Dated: June 23, 1981

Respectfully submitted,

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